PACIFIC & ORIENT INSURANCE CO. SDN. BHD.

v.

GIMSTERN CORP. (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 24-441 OF 1985]
12 FEBRUARY 1987

CIVIL PROCEDURE: *Order 14 of the Rules of the High Court 1980 application - Guarantors - Issue of past consideration - Distinction between a one-off transaction and a running account.*

The plaintiff sued the first defendant for a insurance premiums due and owing on a running account. The other defendants on this action are directors of the first defendant company. They were sued upon individual guarantee agreements which each of them had executed. Judgment was obtained in default of appearance against the first defendant. Summary judgment on a contested application before the Senior Assistant Registrar was obtained against the other defendants. The defendants appealed against the order.

Held:

[1] A distinction must be made between a one-off transaction which is a closed chapter on the date on which the guarantee is given and an on-going relationship.

[2] In a one-off transaction, the benefit must be given either at the time of the execution of the guarantee or in the future but not a past benefit. But this is not so in an on-going relationship, where the claimant is only prepared to carry on doing business with the principal debtor on the strength of the guarantor's obligations.

[Appeal dismissed.]

Cases referred to:

Perbadanan Kemajuan Negeri Selangor v. Public Bank Berhad [1980] 1 MLJ 172
Kalicharan v. Abdul Rahman & Ors. [1918] AIR PC 226
M. Gulam Hussein Khan v. M. Fayas Ali Khan [1949] AIR OUDH 346
Khalid Panjang & Ors. v. Public Prosecutor [1964] 30 MLJ 108

Legislation referred to:

Contracts Act [Ind], s. 127
Contracts Act 1950, s. 80

For the plaintiff - Kumar; M/s. Varughese & Co.
For the defendants - Ho Thian Cheh; M/s. Ho Thian Cheh & Co.

SIVIL PROSEDUR: *Permohonan Aturan 14 - Penggerenti - isu "Balasan Lampau". Perbezaan di antara salah satu transaksi dan akaun yang dijelaskan.*

Plaintif menyaman defendan pertama di atas sebab primium insuran yang patut dibayar dan akaun yang masih belum dijelaskan.

Defendan yang lain dalam tindakan ini adalah pengarah-pengarah kepada syarikat defendan pertama. Mereka disaman sebagai penggerenti individu, atas persetujuan yang telah mereka laksanakan. Penghakiman telahpun diterima terhadap keingkaran defendan pertama untuk menghadirkan diri di mahkamah. Penghakiman terus dari Penolong Kanan Pendaftar telah diberikan kepada pemohon-pemohon terhadap defendan-defendan lain. Defendan-defendan merayu terhadap keputusan itu.

Diptuskan:

[1] Pembezaan hendaklah dibuat di antara satu transaksi yang telah diselesaikan pada tarikh di mana gerenti telah diberikan dan dengan satu perhubungan yang masih lagi diteruskan.

[2] Di dalam salah satu transaksi, faedah mestilah diberikan sama ada semasa penggerenti melaksanakannya atau di masa akan datang tetapi bukan sebelum itu. Tetapi ini adalah tidak berlaku di dalam perhubungan yang dijalankan. Dimana pihak menuntut hanya bersedia menjalankan perniagaan dengan peminjam utama berdasarkan ketegohan obligasi penggerenti.

[Rayuan ditolak.]

JUDGMENT

Mahadev Shankar J:

The plaintiff sued the first defendant for insurance premiums due and owing on a running account. The other defendants in this action are directors of the first defendant company. They were sued upon individual guarantee agreements which each, of them had executed. Judgment was obtained in default of appearance against the first defendant. Summary judgment on a contested application before the Senior Assistant Registrar was obtained against the other defendants. Against that summary judgment these other defendants appealed to me. I dismissed the appeal. My reasons now follow.

On 12 October 1978 the plaintiffs entered into a written agency agreement with the defendants. Under the agreement the first defendant was appointed as agent for the plaintiff with effect from 1 February 1978. The plaintiffs claimed that they were induced to enter into this agreement with the first defendant by reason of a representation by the other defendants that they would guarantee any payments which may become due and payable by the first defendant to the plaintiff under the terms of the agency agreement aforesaid.

Under the agency agreement the first defendant was authorised to accept insurance on behalf of the plaintiff for various risks. Consequently premiums which were collected by the first defendant became payable from time to time, resulting in a running account between the plaintiff and the first defendant. The plaintiff rendered monthly statements of account. Clause 16 of the agreement gave each party liberty to determine the agreement on one calendar month's notice in writing.

On 17 November 1978 each one of the other defendants signed a guarantee agreement. This document is in common form. The case for the plaintiff was that each of the other defendants executed this guarantee agreement pursuant to the earlier verbal agreement to do so, on the basis of which the plaintiff had entered into its agency agreement on 12 October 1978. In his affidavit in opposition to the application for summary judgment, the second defendant denied that the guarantee agreements were executed by him and the other director pursuant to this earlier verbal agreement. What he did not do was to explain why, if there was no such earlier agreement he and the other defendants signed them at all.

The terms of the guarantee agreements are material to this appeal. They read:

> In consideration of the appointment M/s. Gimstern Corporation (M) Sdn. Bhd. as agent by Pacific & Orient Insurance Co. Sdn. Bhd. I the guarantor hereby undertake and guarantee the payments due and other sums of money which may become payable by the agent under the terms of the written agreement ... and I, the guarantor, agree that this guarantee shall not be in anyway avoided ... by the company giving time to the agent ... and the agent making any variation in the terms of the said agreement ... provided that no variation shall make me liable for a sum greater than RM10,000 only under this guarantee ...

Thereafter business was done under the agency agreement and month after month the plaintiff served the first defendant with monthly statements of account. By 1985 the quantum of premium due and owing by the first defendant to the plaintiff had accumulated to RM78,366.01. A demand was made for this money from the first defendant and the guarantors which obviously did not produce results and on 18 May 1985 the plaintiffs filed this action.

The first line of defence taken by these defendants is that the guarantee is void because it is not supported by consideration. Mr. Ho Thian Cheh of Counsel submitted that since the agency agreement had already been concluded more than a month prior to the date when the guarantee agreements were executed, the benefits conferred by the agency agreement upon the first defendant had already crystallised. Therefore it constituted a past benefit. On 17 November 1978, when the guarantee agreements, were signed, he submits that the benefits which moved under the agency agreement, were a spent force and could not constitute independent consideration for the guarantee agreements.

He supported the submission by referring to *Perbadanan Kemajuan Negeri Selangor v. Public Bank Berhad* [1980] 1 MLJ p. 172. There the plaintiffs PKNS had entered into a contract with a construction company referred to in the judgment as BETON. As a condition precedent to the commencement of work BETON was required to deposit a bank guarantee which they obtained from Public Bank Berhad. BETON failed to perform. PKNS enforced the guarantee. The bank disputed liability, *inter alia* on the ground that no consideration for the guarantee was given. Mohd. Azmi J held on the facts of that case that there was consideration for the guarantee. However in the course of his judgment, he said at p. 175:

> As regards the authority in *Ram Narain v. Lt. Col. Hari Singh* in dealing with s. 127 of the Indian Contracts Act - which is equivalent to our s. 80 the Court held that guarantee is in the nature of a collateral engagement to answer for the debt, default or miscarriage of another as distinguished from and original and direct engagement for the parties own act. For the validity of a contract of guarantee, it is adequate consideration if anything is done or any promise made for the benefit of the principal debtor. It was also held that anything done or any promise made for the benefit of the principal debtor must be contemporaneous to the surety's contract of guarantee in order to constitute consideration therefor. A contract of guarantee executed afterwards without any consideration is void. In *Ram Narain's* case the Court held that the contract of guarantee was one without consideration since nothing was done for the benefit of the principal debtor on the day when the contract of guarantee was executed. Illustration (C) of s. 80 reads:
>
> > A sells and delivers goods to B and C afterwards without consideration agrees to pay for them in default of B. The agreement is void.
>
> Having regard to the above illustration and the judgment in *Ram Narain's* case, I told that to sustain the validity of a contract of guarantee, the creditor must have done something for the benefit of the principal debtor. The benefit must be given either at the time of execution of the guarantee or in the future, but not a past benefit. An example of future benefit is a guarantee given for bank overdraft. The guarantee is given first before the creditor lends money to the principal debtor.

Mr. Ho contends that the facts in the present case fall within the four walls of the passage which I have just set out.

But with respect, the benefits provided by the plaintiff to the first defendant under its agency agreement did not terminate before 17 November 1978. What they had contracted for, was an ongoing relationship which subsisted until 1985 when the present action was filed. The decision is therefore against him even on the facts.

Mr. Kumar of Counsel for the plaintiff drew my attention to the decision of the Privy Council in *Kalicharan v. Abdul Rahman & Ors.* [1918] AIR PC 226. This decision was followed in *M. Gulam Hussein Khan v. M. Fayas Ali Khan* [1949] AIR OUDH 346, *Khalid Panjang & Ors. v. Public Prosecutor* [1964] 30 MLJ 108 is a decision of the Federal Court where it was held that a Privy Council decision on a section of an Indian statute which is identical to the corresponding section of a Malaysian statute, is binding on a Malaysian Court.

Kalicharan's case was not cited to Mohd. Azmi J.

The facts in *Kalicharan's* case are instructive. As appears from the report at p. 227 of that decision, the deed of arrangement was registered on 22 January 1909. On 27 January 1909 the defendants executed a surety bond in favour of the plaintiff by which, after reciting that the first defendant had taken the lease, the other defendants aforesaid stood surety for the first defendant. By their defence these sureties alleged that the surety bond was without consideration, that they were not sureties for the purchaser at the execution sale, and that the plaintiff did not enforce the conditions of the agreement on non-payment of the first instalment. The Privy Council held that:

> This was an idle defence. There was ample consideration for the bond; anything done, or any promise made for the benefit of the principal, may be a sufficient consideration to a surety for giving a guarantee.

Indeed in the subsequent decision the Oudh High Court held:

> The word 'done' in s. 127 shows that past benefit to the principal debtor can be good consideration for a bond of guarantee.

However, the Indian decisions just cited did not deal with the effect of illustration (c) under the relevant section (s. 80 in the Malaysian Contracts Act and s. 127 in the Indian Contracts Act). It seems to me that the distinction must lie between a one-off transaction which is a closed chapter on the date on which the guarantee is given, and an ongoing relationship, as in this case, where the claimant is only prepared to carry on doing business with the principal debtor on the strength of the guarantor's obligations.

Consequently I am of the view that there is no merit in this submission.

The second submission was that each of the guarantors was liable to the extent of RM10,000 only. This submission rested purely on the words of the guarantee agreement.

With respect to Mr. Ho those words do not support his contention. The first part of the guarantee agreement clearly provides that each guarantor undertook and guaranteed the payments due and other sums of money which may become payable by the agent. That clearly meant all payments due and which may become payable by the first defendant after the guarantee agreement was signed. The second part of the guarantee agreement gave the plaintiff immunity from any indulgences granted by the plaintiff to the first defendant and from any variations made in the terms of the agency agreement. The proviso limiting the liability of the guarantors to RM10,000 only came into play if a variation was made thereafter to the agency agreement. So the words were "shall make me liable."

For this reason I decided that the second submission made by Mr. Ho was also without substance and gave judgment against all the other defendants.

The order for costs which I made followed the event.

Also found at [1989] 2 CLJ 721